

BLACKHAWK COAL CO.

IBLA 87-589

Decided September 8, 1988

Appeal from a decision of the Director, Minerals Management Service, granting in part and denying in part an appeal from orders to pay additional royalty and late payment charges, and remanding for allowance determinations relating to the additional charges. MMS 85-0051-MIN.

Appeal dismissed.

1. Appeals: Jurisdiction--Rules of Practice: Generally--Rules of Practice:
Appeals: Dismissal

30 CFR 290.7 permits any party to a case adversely affected by a final decision of the Director, Minerals Management Service, to file an appeal with the Board of Land Appeals in accordance with the procedures provided in 43 CFR Part 4. Where in an appeal to the Board from a decision of the Director there is no showing that a particular issue raised by appellant in the appeal before the Board was before the Director for consideration at the time he issued his decision, the appeal to the Board must be dismissed as to that issue, since, in the absence of consideration of and a decision on the issue by the Director, the Board lacks jurisdiction to consider the issue.

APPEARANCES: Hugh C. Garner, Esq., Salt Lake City, Utah, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Blackhawk Coal Company has appealed from a May 1, 1987 decision of the Director, Minerals Management Service (MMS). On December 29, 1987, appellant filed with this Board a statement of reasons for appeal (SOR). On May 16, 1988, the Board received from MMS a motion to dismiss appellant's appeal.

In the May 1, 1987 decision, the Director considered appellant's appeal from an MMS March 8, 1985 demand letter requiring appellant to pay additional royalties of \$4,639,939 for the period October 1, 1981 through

June 30, 1984, and from a subsequent letter dated August 13, 1985 assessing appellant \$1,261,820.79 in late payment charges for late payment of the royalties during that period. In his decision, the Director denied in part, granted in part, and remanded appellant's appeals. The purpose of the remand order was to permit Blackhawk to apply for washing and processing allowances which are authorized by regulation. Blackhawk was instructed to submit the necessary information for consideration of the allowances.

In accordance with the Director's remand, Blackhawk submitted data to support its application for an allowance for coal washing. Subsequently, in a letter dated December 4, 1987, MMS approved the washing cost allowances and reduced the additional royalty due by \$1,332,382.64 and adjusted the late payment charges to \$1,266,136.40 (which represents the period through November 30, 1987). In its SOR, Blackhawk explains: "Blackhawk accepts the washing allowances stipulated in said letter of December 4, 1987 and the re-determined late payment charges through November 30, 1987 and withdraws its appeal to this Board to this extent. Blackhawk has remitted to MMS such royalty and late payment assessments" (SOR at 5).

According to Blackhawk, the single issue it seeks to pursue in the present appeal relates to whether certain transportation costs should properly be allowed as deductions. As explained by Blackhawk:

Blackhawk's mining operation is unique in that the mine portal for Mine No. 5 is located in Hardscrabble Canyon approximately 3 miles above the State road and a total of about 5 miles from the weighing scales and the washing plant. The road to the mine is paved, but is a narrow, two-lane highway. The traffic flow, narrowness of the canyon and road conditions preclude the sale or delivery of coal at the mine portal. To compound the congestion a company warehouse and maintenance shop are located at the top of the canyon in close proximity to the point of load-out at the mine portal. In fact, the area is posted to exclude all but authorized personnel. It is necessary, therefore, to truck the coal to the scales at the site of the washing plant. The coal was transported by commercial truckers for the two months in 1981 and the years of 1982, 1983, and 1984, at a total, direct cost of \$2,715,771.00. * * *

(SOR at 5, 6).

In its motion to dismiss, MMS states that the first time that Blackhawk requested an allowance for the above-described transportation costs was in a letter dated September 10, 1987, in which Blackhawk submitted data to support an application for an allowance for coal washing. MMS further explains that it "denied Blackhawk's request and gave it its appeal rights by letter dated October 23, 1987. Blackhawk did not appeal this denial to the Director, MMS" (MMS Motion to Dismiss (Motion) at 3). MMS in its October 23, 1987 letter found:

Blackhawk's request for coal transportation allowance from the No. 5 mine to the preparation plant is denied. The costs of

transportation of coal during mining operations or during those operations which can reasonably be considered a normal part of mining are components of coal value for royalty purposes and are not included in transportation allowances deductible from royalties.

MMS, in its motion to dismiss, argues that since Blackhawk did not raise the issue of a transportation allowance from the mine to the preparation plant prior to the Director's decision of May 1, 1987, the Director never considered this issue, and, thus, because of a lack of a ruling by the Director, "this Board does not have jurisdiction to decide this matter" (Motion at 3).

In response to MMS's motion to dismiss, Blackhawk asserts that the transportation allowance issue "was at all times before the Director." The issue

together with the issues of washing allowances, late charges, etc. were part and parcel of the entire audit procedure. How else could any royalty rate be fixed without considering all aspects of those deductions, including the transportation allowance, which might be allowed or disallowed. The Director made his decision, excluding transportation charges, and the matter is now properly before the Board on this Appeal.

(Blackhawk Response at 5). Blackhawk argues that "[p]erhaps the most telling refutation for MMS's argument" that the transportation issue was not before the Director "is the Director's recognition in his May 1, 1987 decision that the transportation issue had been considered when he reviewed [the] audit determination" (Blackhawk Response at 5). In support of this assertion, appellant sites the language in the Director's decision which pointed out that MMS's Royalty Management Program staff had excluded from the royalty values "[c]ertain transportation charges paid separately by nonaffiliated customers * * *" (Director's Decision at 3). Blackhawk also states that it appealed from the Director's decision "based in part on actions taken by the Director which included his exclusion of transportation allowances." Id. at 6.

[1] Despite Blackhawk's contention that the transportation allowance issue was before the Director at the time he made his decision, Blackhawk has not directly refuted MMS's position that Blackhawk did not request review of the denial of a transportation allowance for the No. 5 Mine until after the May 1, 1987 Director's decision. A full review of the record now before the Board fails to show any discussion or resolution of this issue prior to the September 10, 1987 and October 23, 1987 letters exchanged between appellant and MMS. Further, appellant's reliance on the discussion in the Director's decision concerning transportation charges paid separately by nonaffiliated customers does not support an inference that costs incurred by Blackhawk for transporting coal from the mine portal to the preparation plant had also been considered and rejected. From our review of the record before us, we conclude that the transportation issue in question in the present appeal was not before the Director when he issued his May 1, 1987 decision.

Departmental regulation 30 CFR 290.7 authorizes appeals to this Board from final decisions of the Director, MMS. The regulations permit full consideration by MMS of any challenged decision to permit, as occurred in the case presently on appeal, correction of erroneous decisions made by MMS personnel. However, in the absence of a decision by the Director, an appeal to this Board must be dismissed for lack of jurisdiction. As explained above, the record and appellant have failed to establish that the issue of transportation cost allowances for the No. 5 mine was reviewed and decided by the Director. Consequently, the MMS motion to dismiss must be granted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge